KOPERASI SERBAGUNA CUEPACS TANGGUNGAN BHD.

v.

CITY INVESTMENT SDN. BHD.

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. 189 OF 1980]
21 FEBRUARY 1984

CONTRACT: *Statutory provisions - Attempts to avoid - Effect of - Illegal - Contrary to public policy - Whether specific performance an equitable remedy.*

DAMAGES: *Loss from breach of contract - Recoverable only if reasonably foreseeable at the time of the contract - Actual or imputed knowledge of parties.*

EVIDENCE: *Parole evidence - Whether admitted to construe provisions of a written agreement - Evidence Act 1950 ss. 92 & 114(g).*

LAND LAW: *Housing Developers - Definition of - Late delivery of vacant possession - Statutory provision for - Housing Developers (Control & Licensing) Act 1966 s. 3.*

The plaintiffs, (the purchasers), entered into two sales and purchase agreements with the defendants (the vendors). It was stipulated in the first agreement that the vendors would appoint a licensed housing developer in accordance with the statutory provisions who would execute a building contract with the purchasers for building single storey terrace houses. Under the second agreement, the vendors agreed to sell vacant land consisting of 11 lots to build bungalows and 14 lots to build semi-detached bungalows. The full land price and development price for the terrace lots were paid in full but the price of construction of the terrace houses was not paid as the houses were never built. The vendors appointed themselves as the developer under the first agreement. The vendors submitted a draft building contract to provide that as a contractor it was not bound by legislation on housing developers. Only one terrace lot and one semi-detached lot were transferred to the purchasers. The other semi-detached lots were not transferred as the vendors contended that the purchasers did not pay for excess land included in the titles for 4 semi-detached lots. 10 of the bungalow lots were not levelled by the vendors.

Held:

[1] The first agreement was within the purview of the Housing Developers (Control and Licensing) Act 1966. It contained a well-defined building contract.

[2] The vendors were liable for failure to transfer 59 terrace lots to the purchasers and to build 60 terrace houses under the first agreement. The first agreement had to be specifically performed. The vendors had to pay RM960,000 as damages for failure to build 60 terrace houses and RM187,200 as damages for late delivery of vacant possession.

[3] The vendors were liable for failure to transfer the titles of 9 semi-detached lots for which there was full payment and not as regard 4 lots for which payment for excess land had not been paid. The second agreement with regard to the 13 semi-detached lots ought to be specifically performed. The vendors had to pay RM117,000 as damages for consequential loss by way of increased costs of constructing buildings on 9 semi-detached lots.

[4] The vendors were liable for failure to level 10 bungalow lots under the second agreement and to transfer 11 bungalow lots. The second agreement with regard to the one bungalow lot which was not affected by difficult terrain ought to be specifically performed. The vendors had to pay RM203,000 being the contract price for the 10 bungalow lots together with interest at rate of 4% p.a. from 9 August 1978 to the date of judgment and thereafter at the rate of 8% p.a. until date of satisfaction. The vendors had to pay RM148,500 for damages for increased costs of construction of buildings on 10 bungalow lots.

[5] In relation to all terrace lots, the semi-detached lots and the solitary bungalow lot, a sum being the difference between extra payments for excess land and excessive payment for deficient land, be paid by either of the parties hereto to the other party, to the latter it is due.

Cases referred to:
S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo [1982] 2 MLJ 31; [1982] CLJ (Rep) 305
Johnson and Another v. Moreton [1978] 3 All ER 37
Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor. [1981] 1 MLJ 56
Prenn v. Simmonds [1971] 1 WLR 1381
Hasham v. Zenab [1960] AC 316
Mertens v. Home Freeholds Co. Ltd. & Ors. [1921] All ER 372
Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. [1949] 1 All ER 997
Fletcher v. Autocar & Transporters Ltd. [1968] 1 All ER 726
Diamonds v. Campbell-Jones & Ors. [1961] 1 Ch 22

Legislation referred to:
Evidence Act 1950, ss. 92, 114 illus.(g)
Housing Developers (Control and Licensing) Act 1966, s. 3.
Housing Developers (Control and Licensing) Rules 1970, rr. 2, 12(1)(r)

For the plaintiffs - N. Ramachandran & (Datin Saraswathy Devi with him; M/s. N. Saraswathy Devi)
For the defendants - P. Cumaraswamy, (R.R. Sethu & Porres P. Royan with him); M/s. Shook Lin & Bok

JUDGMENT

Peh Swee Chin J:

The plaintiffs, (the Purchasers), a co-operative society entered into two purchase agreements with the defendants (the Vendors), both dated 24 November 76.

Both agreements recited that the Vendors were the registered owners of a piece of land of approximately 49.871 acres (the said Land) held under Grant 15947 for Lot 3002, Mukim of Rasah in the District of Seremban; that they had applied to the relevant authorities for conversion and subdivision of the said Land in accordance with lay-out plan attached thereto, into building lots and for issue of separate documents of title thereto.

Under the first of these agreements, (Agreement No.1), the Purchasers had agreed to buy, in effect, 60 of such sub-divided lots (Terrace Lots) for a single-storey terrace house to be built on each of them. Agreement No.1, (A3 to A15), by its Clause (E), which is of some importance in this case, provided:

> The Purchaser has requested and the Vendor has agreed to appoint a Licensed Housing Developer with whom the Purchaser can execute a Building Contract for the construction of the proposed building on each of the said Plots.

The "proposed building" refers to the single-storey terrace house and the "Plots" refer to the Terrace Lots.

a By Clause (1) of the Agreement No. 1 (A2 or at A2), the Vendors agreed to sell and convey free from all encumbrances, etc. the said Terrace Lots for a price of RM720,000 inclusive of the "development price" as set out therein, for cleaning and levelling the Terrace Lots.

Clause (2) and (3) (i.e., A4 and A5), of the Agreement No. 1 are crucial in this case and they are set out in full below:

b (2) Within two (2) months commencing on the date of the receipt by the Vendor of the written notification by the Appropriate Authorities of the approval of the conversion and sub-division of the said Land, the Vendor shall appoint a Licensed Housing Developer (hereinafter referred to as "the Developer") for the construction of the proposed building in accordance with the provisions and requirements of the Housing Developers (Control and Licensing) Act 1966 and the rules thereunder and subject to the provisions and requirements of any Act, Enactment, Ordinance, by-law or regulation for the time being in force and the *c* sanctions of the Appropriate Authorities, for the sum specified in s. (9) of the First Schedule hereto (hereinafter referred to as "the Construction Price").

(3) The Purchaser hereby covenants to enter into a Building Contract with the Developer for the construction of the proposed building for the Construction Price within two (2) months commencing on the date of receipt by the Purchaser of the Vendor's notice in writing of the appointment of the Developer.

d It is pertinent to point out as regards Clause (2) above, that the licensed housing developer to be appointed, would have to construct these single-storey terrace houses (Terrace Houses) in accordance with the provisions and requirements of the Housing Developers (Control and Licensing) Act 1966 (the Act) and the Housing Developers (Control and Licensing) Rules 1970 (the Rules) while as regards Clause (3), both parties envisaged that there would be a *e* subsequent building contract for the construction of the Terrace Houses. I mention these because a great deal of the controversy herein turns on these clauses. Further the price of construction was agreed at RM14,000 for each of the Terrace Houses; so were their specifications as set out in detail in the Agreement No. 1. A standard building plan of the Terrace Houses prepared by architects was also agreed and appended to the Agreement No. 1. The other provisions of Agreement No. 1 would appear to be fairly common-place.

f The second of the said two agreements, (Agreement No. 2) between the same parties, though similar to Agreement No. 1 in many ways, was significantly different from it in other ways. Under it, the Vendors agreed to sell only vacant land to the Purchaser i.e., 11 lots of the said Land of 7,000 sq. feet each intended for building thereon on each of them, a detached bungalow (the Bungalow Lots) and 14 lots of the said Land similarly for semi-detached bungalows, (semi-detached Lots), at the prices as agreed and set out therein. The prices *g* expressly included land price and the "development price". Conspicuous by their absence in Agreement No. 2 are clauses similar to Clause (2) and (3) of the Agreement No. 1 as well as building plan and detailed specifications found in Agreement No. 1. A problem also appears to arise herein out of the question of offer of alternative lots of land in the Agreement No. 2 from the Vendors to the Purchasers in certain circumstances and Clause (7) of the Agreement No. 2, (at A20), dealing with it, is set out below:

h (7) The Purchaser hereby acknowledges that he has noticed that the said Plots form part of the overall development of the said Land and by reason thereof the condition state nature and character of the said Plots may be altered from time to time during the continuance of the Land development works until the completion of the development of the area within which the said Plots are situated. Notwithstanding the provisions herein the Purchaser hereby covenants and agrees that no such alteration of the condition state nature and character of the

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said Plots shall annul this sale or be the subject of any claim for damage or compensation on either side and the Purchaser covenants that he shall accept and be deemed to be satisfied with the said Plots in the condition state nature and character as on the date of completion of the development of the said Land, PROVIDED that in the event that such alteration materially effects the said Plots or any one of them the Vendor shall have the right to re-allocate to the Purchaser alternative Plots in the said Land and the Purchaser shall have the right either to accept or reject such alternative Plots and in the event of the Purchaser rejecting such alternative Plots the Vendor shall refund to the Purchaser without interest all monies proportionately paid by the Purchaser to date towards such of the said Plots as are materially altered, whereupon the sale and purchase of such of these materially altered Plots shall be deemed to be mutually rescinded and thereafter neither the Purchaser nor the Vendor shall have any claims whatsoever against the other in respect of such of these materially altered lots.

I will now deal first with the disputes and the opposing contentions of both parties as regards the Agreement No. 1, but without setting out however, the details of their lengthy submissions and massive evidence, only referring to them, from time to time. The full land price and development price for the Terrace Lots amounting to RM720,000 had been paid in full, leaving unpaid, the price of construction of Terrace Houses which were never built. In pursuance of Clause (E) of the Agreement No. 1, the Vendors appointed, within the stipulated time, licensed housing developers for implementing the provision of constructing the Terrace Houses in the Agreement No. 1, and they, in fact, appointed themselves as such licensed housing developers for the purpose of the said Clause (2). Amidst apparently disharmonious negotiations, judging at least by the relevant correspondence that passed between the parties, the Vendors sent a draft building contract, (A40), prepared by their solicitors and subsequently, copies of such draft building contract, (A68), incorporating some minor amendments to (A40) but, containing however, the same conditions as those in (A 40) (with the Vendors having in advance signed on A68) were forwarded to the Purchasers for signing. The Purchasers refused to sign them, because they raised vigorous objections to Clause (1) and (2) in (A40) and repeated in (A68). They are set out below:

(1) The parties hereto hereby agree that as the said Plots have already been sold to the Owner, the construction by the Contractor of the said buildings does not bear the meaning of "the business of development ... with a view to selling the same within the definition of the phrase "housing development" in s. 3 of the Housing Developers (Control and Licensing) Act,1966 (Revised 1973) and accordingly, although the Contractor will be constructing more than four units of housing accommodation, the Contractor will not in this particular case be engaged in or carrying on or undertaking a housing development or is desirous of doing so and is therefore not a housing developer within the terms of the aforesaid Act.

(2) In view of the provisions in Clause (1) hereof, the parties hereto hereby confirm that Clause (2) of the Sale of Land Agreement was agreed to in error and that the contractor will execute this Building Contract with the Owner in its capacity as Contractor only and not in its capacity as a housing developer and as a result thereof this Building contract need not comply with the provisions and requirements of the Housing Developers (Control and Licensing) Act 1966 and the rules thereunder or be subject to the provisions and requirements of any Act, Enactment, Ordinance, by law or regulation for the time being in force or the sanctions of the Appropriate Authorities except as hereunder expressly provided.

The Vendors' Counsel argued to the effect, first, that Agreement No. 1 was an agreement of sale purely of land minus houses, i.e., sale of the Terrace Lots minus the Terrace Houses. The sale of Terrace Houses, the Vendors maintained, would be the subject matter of a building contract to be made later and separately between the Purchasers and the appointed licensed housing developers, the latter to be appointed in the first place, by the Vendors. the

Agreement No. 1 was therefore outside the scope of the Act with r. 2 of the Rules having defined a contract of sale, as sale of housing accommodation, therefore clearly providing for sale of both land and house together. The mere mention of the Act and the Rules in Clause (2) of the Agreement No. 1, they argued, did not alter the true character of the Agreement No. 1, as such legislation, could not by a contract, be made to apply to a transaction not attracted by it. This argument, of course, if upheld by the Court, will justify the inclusion of Clause (1) and (2) of the draft building contract or (A40), which appear to seek to exclude expressly the building contract from the operation of the legislation on housing developers mentioned above, and also to confirm that Clause (2) of the Agreement No. 1 was an error.

Counsel for the Purchasers most vigorously objected to such construction placed on the Agreement No. 1 and argued that s. 3 of the Act defined a housing developer as a person etc. engaged in housing development or a person desirous of doing so and the housing development as defined would include land, or sale of land to be occupied by housing accommodation to be constructed thereon. The Vendors were therefore within the meaning of the words "housing developer" in the Act. Further, it was argued to the effect, that the Terrace Lots were sold for the purpose of constructing housing accommodation thereon. Learned Counsel referred to the price of development mentioned by DW2; the evidence of the municipal engineer (PW6) mentioning the submission of building plans, apparently after conversion and subdivision of the said Land, and the fact of the Vendors appointing themselves as the Licensed Housing Developers by their Letter (A37). Counsel further argued that the Vendors could not attempt to contract out of the Act. Counsel cited *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] CLJ (Rep) 305 , FC, (which curiously enough, was also relied on by learned Counsel for the Vendors); *Johnson and another v. Moreton* [1978] 3 All ER 37 and *Daiman Development Sdn. Bhd. v. Mathew Lui Chin Teck & Anor.* [1981] 1 MLJ 56, PC.

On the acceptability or otherwise of the contention by the Vendor that Agreement No. 1 was an agreement for sale of Terrace Lots only minus the Terrace Houses, consequently not caught by the Act or the Rules having regard to the definition of housing development as the business of developing etc. more than four units of housing accommodation, I think one ought to find the answer within the four corners of the Agreement No. 1 and not to rely at all, as both Counsel tried to do, on the oral evidence of witness called, as regards the negotiation for the terms of the Agreement No. 1 and also what they thought the terms in the Agreement No. 1 meant or should mean. Such evidence should be disregarded if used to construe its terms. See s. 92 of our Evidence act 1950. Specificially, evidence of negotiations and evidence of parties' intention about such terms of Agreement No. 1 is irrelevant. In *Prenn v. Simmonds* [1971] 1 WLR 1381, 1385, Lord Wilberforce said:

> In my opinion, then, evidence of negotiations, or of the parties' intentions, and a *fortiori* of Dr. Simmonds' intentions, ought not to be received ...

Looking at Agreement No. 1, the construction put on by Vendors' Counsel appears to be rather strained, capable of doing violence to it. The price, the building plan and specifications for the Terrace Houses were all detailed therein. The Vendors further agreed to appoint a licensed housing developer for the Purchasers and in fact appointed themselves as such housing developers. 60 of the Terrace Houses, i.e. more than 4 units of the housing accommodation, were to be built. They were not only selling the Terrace Lots, but they were also undoubtedly selling the Terrace Houses yet to be built.

On a true construction of Agreement No. 1, I find first, that the Vendors were selling both Terrace Lots and Terrace Houses by Agreement No. 1; secondly the Agreement No. 1 was within the purview of the Act and the Rules, and thirdly the Agreement No. 1 constituted or incorporated a binding, concluded and sufficiently well defined building contract in regard to the Terrace Houses, not dependent for its enforceability on the subsequent signing of the draft building contract, (A40), which merely reflected the desire of the parties hereto as to the form in which their transaction was to take place. Parties hereto would be deemed to be bound by these statutorily mandatory provisions such as those in r. 12 of the Rules as if the same were engrafted or added to the Agreement No. 1 by consent.

In view of my conclusion mentioned above, the formality of the subsequent building contract, (A40), it, if signed by both the parties hereto, should not attempt to evade the provisions of the Act and the Rules in any way. In *Daiman* case, *(supra)*, with reference to such a similar building contract, the then Lord President, Tun Suffian, said that only details might be inserted into such a further building contract. In that case the developers were precluded by the Court from increasing the price in question and fixed earlier. In a subsequent case of *S.E.A. Housing Corporation Sdn. Bhd. (supra)*, the then Lord President Tun Suffian further clarified, that such details must be details, not inconsistent with the Act and the Rules and that any terms and conditions which purported to get round the Act and the Rules so as to remove the protection of house buyers, might not be inserted. Now the insertion by the Vendors of Clause (1) and (2) of the draft building contract was at the heart of the problems in the case, the immediate and main cause of the refusal of the Purchasers to approve and sign the draft building contract. From the undoubtedly clear meaning of the words of the disputed clauses themselves; it was a clear attempt to get around the Act and the Rules and to remove any protection available under the Act or the Rules to the Purchasers. The clauses were also inconsistent with the Act and the Rules. They were illegal or against the public policy, for to use the words of Lord Simon in *Johnson & Anor v. Moreton (supra)* in connection with the attempted avoidance there of provision of Agricultural Holdings Act, 1948 of England, that to allow such clauses to stand, "it would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provisions a dead letter".

Learned Counsel for the Vendors next contended that the Clause (1) and (2) of the draft building contracts were modifications or variations to the Agreement No. 1, they having been agreed to by the Purchasers. He argued further that evidence about the agreed variations was given by witnesses called for the Vendors; but the Purchasers had called no witness, and the inference or adverse inference should be drawn. Counsel must have in mind s. 114(g) of the Evidence Act about evidence which could be produced but is not produced, would be evidence unfavourable to the person withholding it. In my view, a Court need not feel obliged to presume so in every case, and it should not presume so where there are circumstances justifying the non-production in question. It would be justifiable for the Purchasers not to call witness to deny these variations which were themselves illegal and against the public policy. This reason would be sufficient justification for not calling such witnesses, but there were other circumstances, such as the repeated denials of PW1, when cross-examined on it; and that it was these very hotly disputed clauses that compelled the Purchasers to come to Court in the first place. Again, such evidence of the Purchasers consenting to the said variations would be so inherently and highly improbable, that there would be no occasion for calling rebutting evidence. It would be incomprehensible for the executives or directors of the Purchasers/Co-operative Society, a group of well-educated

government officials who dealt with the Vendors, to consent to the removal of the protection given by the Act and the Rules to them. The Vendors, by attempting to force these disputed Clause (1) and (2) on the Purchasers were attempting to shape the world as it suited them.

I hold further that they are liable for failure to transfer to the Purchasers 59 Terrace Lots and to cause to be built, or to build 60 Terrace Houses described in Agreement No. 1. It cannot be disputed that only one out of the 60 Terrace Lots was transferred and that the Vendors had refused or neglected to transfer the rest of the Terrace Lots, (or their documents of titles).

On Agreement No. 2, having regard to submissions of Counsel, it will be convenient to deal with it, first as regards the 14 Semi-Detached Lots and then the 11 Bungalow Lots.

Of the 14 Semi-Detached Lots it was common ground that one had been transferred by the Vendors to the Purchasers. At the trial and in submission, it became apparent that the Vendors had refused to transfer the other remaining Semi-Detached Lots, though requested to do so, for one reason which the Vendors really asserted or pressed in arguments, i.e. that excess land included in sub-divisional documents of titles of 4 of the Terrace Lots, had not been paid for. They informed the Purchasers by a very brief letter dated 23 March 1979, citing Clause (9) of the Agreement No. 2 for liability to pay for such excess land. It will be observed that this letter dealt expressly only with Agreement No. 2 and not the Terrace Lots, or the Agreement No. 1. A list of the 14 Semi-Detached Lots with their respective areas and titles numbers, as extracted from p. 222 of the appeal record in Federal Court Civil Appeal No. 117 of 1982, (an appeal from certain interlocutory order made in the present case) shows six (6) of such remaining 13 Semi-Detached Lots to have respective areas of 5,000 sq.ft. involving neither excess or deficit of land area, and therefore no excess payment was required. Three (3) of them would appear to have a similar area than that sold and the last four (4) would appear to have excess land. The excess or deficit would appear to range between 500 sq. ft. to 2,393 sq.ft. and in terms of payment therefor, between RM1,305 to RM6,939.70.

The Vendors' or their Counsel's further contention was, (in regard to their refusal to transfer the remaining thirteen (13) Semi-Detached Lots), i.e. after transferring only one of them, that the Vendors were selling all the 14 Semi-Detached Lots in one "block" sale and though the purchase price had been paid in full for some Semi-Detached Lots, no transfer of any of such Lots could be effected until in effect the three such Lots which involved some excess land had been paid in full. Therefore, they were not in breach of agreement to transfer them. No authority was cited for their proposition except that reference was made on Clause (9) and Clause (13) of the Agreement No. 2 (A22 and A23 respectively). Clause (9) provided that the difference in such area should not annul any sale and it was to be adjusted in the price payable. Clause (13) provided as follows:

> (13) Upon the issue of the documents of Qualified Title in respect of each of the said Plots and subject to the payment in full by the Purchaser to the Vendor of the land purchase price, the development price and all other monies due to the Vendor in accordance with the provisions of this Agreement and subject further to the Purchaser's performance and observance of the terms and conditions herein provided, the Vendor shall execute a valid and registrable transfer to the Purchaser or his nominee or lawful assignee as the case may be, of the said Plots free from all encumbrances except those imposed by the provisions of this Agreement but subject to the conditions expressed or implied in the said documents of Qualified Title, such transfers to be prepared by the Vendor's solicitors and the Purchaser shall in any event pay the Vendor's solicitors fees in respect of such transfer.

An agreement to modify a written contract, may be inferred, *inter alia*, from conduct subsequent to such contract. In the instant case, one of the 14 Semi-Detached Lots had been transferred without waiting, apparently, for the four (4) of the Semi-Detached Lots which involved excess land, to have the relevant extra sums paid in respect of such excess land. This would in my view, infer an agreement to modify the Clause (13) of the Agreement No. 2 by allowing and making it obligatory for the Vendors to transfer each of these Semi-Detached Lots where full price had been paid, or *a fortiori*, where the Vendors were in fact overpaid. Such evidence, would not also in my view, contravene s. 92 of the Evidence Act 1950.

I therefore hold further that the Vendors were in breach when they failed to transfer these titles for which there was full payment or even excessive payment therefor, though they were not in breach as regards the four (4) titles for which payment for excess land had not been made. I will revert to this matter later when I deal with the reliefs or damages that the Court may provide.

I now deal with the eleven (11) Bungalow Lots. It was not in dispute that of the eleven Bungalow Lots referred to in Agreement No. 2, ten (10) Bungalow Lots were in fact practically and commercially useless for the purpose for which they were bought. According to (A57), the letter from the engineers to the Vendors, such ten Bungalow Lots were situated at a height of more than 100 ft. above the access road in question and a retaining wall costing approximately RM13 million would have to be built in order to level or cut down these lots by 90 to 100 feet. Para. (D) of the preamble of the Agreement No. 2 (A18) provided:

> (D) The Purchaser has requested and the Vendor has agreed to clear and level the said Plots for the Purchaser.

The 'Plots' refer of course to all the Semi-Detached Lots and Bungalow Lots. Clause 1 of the Agreement No. 2 *inter alia* provided, that in consideration of the payment of a "development deposit", to account of development price etc., the Vendors agreed to "clear and level" the said Plots. Clause (27) provided that the clearing and levelling of the said Plots should commence within two (2) months from receipt of notification of approval of conversion and subdivision and Clause (28) provided as follows:

> (28) The Vendor further covenants that the said Plots shall be flat enough to erect a building thereon.

The cost of land inclusive of development price in respect of these eleven (11) Bungalow Lots was paid in full pursuant to Agreement No. 2 to the Vendors. The Vendors were clearly in breach for failing to transfer these eleven (11) Bungalow Lots, because it is now clear, that ten of the eleven such Bungalow Lots were found to be useless unless about RM13 million was expended thereon. They were also in breach for failing to level the ten (10) Bungalow Lots to make them flat enough to be built thereon with houses.

I do not think, with respect to learned Counsel for both parties, that Clause (7) of the Agreement No. 2 could or would bear the meaning accorded to it by them, that in regard to such Bungalow Lots, it would give rise to the intention of making it obligatory to offer alternative lots in place of them etc. In my view, on a true construction of Clause (7), the liability to provide such alternative lots would only arise if the Vendors had, in the course of development of the said Land, altered materially the condition, state, nature and character of the ten Bungalow Lots as to affect them materially. There can be no doubt from the evidence that the situation of the ten Bungalow Lots at a height of more than 100 ft. above the access

road in question was not brought about by any such alteration work, in the course of development carried out by the Vendors, their peculiar situation being due to the natural terrain of the said Land. So much evidence was given and submission made about this question of alternative lots that I felt bound to mention it.

I now turn to the reliefs and damages sought by the Purchasers. Among the reliefs sought, the Purchasers seek specific performance of both the Agreements No. 1 and No. 2.

The remedy of specific performance is discretionary, such discretion to be exercised according to well-settled rules. The right to sue for specific performance in equity is quite distinct from a cause of action at common law. Thus a breach of contract which gives rise to an action for damages is not always a prerequisite for an action for an order for specific performance which is granted when there are circumstances justifying it. Please see the case of *Hasham v. Zenab* [1960] AC 316. Further, since law and equity are administered concurrently by our Courts, this means that the Court can award damages and grant specific performance in the same case, or grant specific performance as to part of a contract and damages as to the rest. In this connection land is always deemed by law to have a special value the loss of which may not be adequately measured or compensated by damages or money. I have mentioned all this to better explain the orders which I will make.

Let me now refer to some of the circumstances found in this case which will induce the Court to intervene in equity. Though the Vendors were not in breach for failure to transfer these four (4) Semi-Detached Lots on account of payment for excess land not having been made, having regard to full contract price for all Terrace Lots, Semi-Detached Lots and Bungalow Lots that had been paid, I think I ought to order specific performance wherever practicable.

Therefore, only as regards the 59 Terrace Lots, 13 of the Semi-detached Lots and the only Bungalow Lot not affected by the difficult terrain referred to earlier, this Court declares that Agreement No. 1 and the Agreement No. 2, to such extent, ought to be specifically performed and carried into effect with the consequential directions that the Vendors do deliver to the Purchasers a valid and registrable transfer of each of them, without any payment of any legal fee whatsoever to the Vendors or their solicitors, within thirty (30) days from today, together with all the relevant documents of titles.

As I do not order specific performance in respect of the ten (10) useless Bungalow Lots referred to earlier, in this connection, I make an order that the Vendors do pay RM203,000 being the contract price paid earlier for such ten Bungalow Lots under Agreement No. 2, together with interest at the rate of 4% per annum from 9 August 1978 (being the date on which the balance of such contract price was paid), to date of judgment, and thereafter at 8% per annum being the usual statutory rate of interest on judgment debt, until date of satisfaction.

I further order that in connection with all the Terrace Lots, all the Semi Detached Lots and the solitary Bungalow Lot which are to be transferred to the Purchasers, a sum, being the difference between extra payment for excess land, and the excessive payment for any deficient land, be paid by either of the parties hereto to the other party, to the latter it is due. There will, of course, be liberty to apply generally.

On the facts of this case, the combination of damages and specific performance is inevitable. In my view, the normal measure of damages for Vendors' failure to build the 60 Terrace Houses ought to be the cost of building them at the earliest moment when the Purchasers would be allowed to proceed with the construction less the contract price. The earliest time would be now, because of the order being now made for the transfer of the titles of the Terrace Lots when all the disputes between the parties hereto are being resolved, today; please see *Mertens v. Home Freeholds Co. Ltd. and others* [1921] All ER 372. We have the evidence of PW3 and according to him the cost of construction of a similar Terrace House would be in the region of RM30,000 in 1982, the contract price per unit being RM14,000 the difference would be RM16,000 per unit. In the absence of evidence of decrease or increase of cost of construction throughout 1983, it is safe to assume that the approximate cost of RM30,000 would remain more or less the same in 1983.

I therefore award under this head of damages, RM960,000, representing the additional cost of building the 60 Terrace Houses.

Learned Counsel for the Purchasers also submitted that the Purchasers were entitled to a sum calculated at 8% of the contract price i.e. total price (of land and building) from 12 December 1979 to 16 July 1983 by virtue of r. 12(1)(r) of the Rules which provides for mandatory inclusion in every contract of sale the following, *viz.*,

> Provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale;

Learned Counsel's claim under r. 12(1)(r) appears to be well founded, though I had my initial doubts thereon. I have held earlier Vendors liable for breach of contract to build the Terrace Houses, and liable to be bound by the statutorily required provisions of r. 12(1)(r), then the compensation or indemnity as stated in such provision would *prima facie* be payable for any delay in delivering the Terrace Houses. Notwithstanding the difference, of which I am not unmindful, between a refusal to build a house and therefore with no house to deliver to a buyer as in our instant case on the one hand, and on the other hand the delay or failure to deliver it in time, but and since the Agreement No. 1, or more specifically, for emphasis, the building contract for the construction of these 60 Terrace Houses has been held to be amenable to the Act and the Rules, would such difference preclude the payment of such indemnity? The difference is more apparent than real. The essence of this head of compensation would, in my view, lie in the delay of enjoyment of the property in question and in the instant case, the delay before the Purchasers could build them themselves. I would allow this claim and now will assess it. Under the Agreement No. 1, the construction of the Terrace Houses would commence on the signing of the draft building contract, (A40), which itself had to be signed within also two months of the appointment of a licensed housing developer. The Vendors appointed themselves as such on 12 April 1978. Assuming the date of commencement of construction be, let us say, at the end of such two months from 12 April 1978 the Vendors would have to complete such construction within 18 months thereafter as fixed statutorily, and therefore would then be in a position to deliver the Terrace Houses, by approximately 11 December 1979. It would be reasonable to compute the indemnity from 12 December 1979 for a period of 18 months or 1½ years, to provide for time for having the Terrace Houses built instead by persons other than and in place of the Vendors.

I therefore award also a sum of RM187,200 computed by way of such indemnity at 8% per annum on a sum of RM1,560,000 being the total purchase price of 60 Terrace Houses (being price for both land and houses) for 1½ years. The award under r. 12(1)(r), would, as held by the then Lord President Tun Suffian in *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo (supra)* preclude the Purchasers here from claiming any other damages on account of complaint of delay in delivery of a house under a building contract to which the Act and the Rules apply, and the Purchasers' additional claim for loss of fair rent would accordingly be irrecoverable.

I now turn to damages, if any, in connection with Agreement No. 2. I will first deal with the Semi-Detached Lots. I have held earlier that the Vendors were in breach of failure to transfer these Semi-Detached Lots which were either already paid for in full or overpaid by the Purchasers. One of the Purchasers' claims for damages rests on the increased cost of construction of houses on these Semi-Detached Lots. It cannot be denied that the Vendors did not contract with the Purchasers to build houses for them here. Learned Counsel for the Purchasers, however, cited the case of *Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd.* [1949] 1 All ER 997 CA. In that case, defendants agreed to sell a boiler to plaintiffs, who were launderers. The defendants knew at the time of contract it was required for the plaintiffs' business and for immediate use. There was delay in its delivery. The trial Judge dismissed the claim for loss of business profits. On appeal, which was allowed, it was held that loss of profits was recoverable. The well-established principle from this case is that all loss resulting from a breach of contract is recoverable if such loss was reasonably foreseeable at the time of contract, and that what was reasonably foreseeable depends on the knowledge possessed by the parties, such knowledge may be actual or imputed. It was held there that there was ample means of knowledge on the part of the defendants that business loss was likely to result from the default.

In the instant case, from the commencement of negotiations prior to the making of the Agreement No. 2, the Vendors I hold, had means of knowing, or actually knew that the Purchasers required these Semi-Detached Lots to build houses thereon for their members. The Vendors, in my view, should know or should have known that, in the face of mounting inflation and building cost, any delay would be likely to result in increased cost of construction. I can reasonably presume that it would appear to be unlikely to the Vendors at that time that the Semi-Detached Lots were acquired for the Purchasers' "land bank" as an investment or otherwise for speculative purpose.

I would therefore allow this claim for consequential loss by way of increased cost of construction as not too remote and as within the principle of *Victoria Laundry*. On this score I accept the evidence of PW3 that the cost of construction of the appropriate semi-detached house was RM28,000 in 1976 and that in 1982 it would be RM45,000. This figure of RM28,000 was not the contract price under Agreement No. 2 as the price of a house on such Semi-Detached lots, for there was none as the Agreement No. 2 dealt with sale of vacant land only. In my view, a figure, though not such a market price, but notionally representing such a market price ought to be the cost of construction in August, 1978 when the titles could have been made available to the Purchasers upon the issue of titles and payment of all balance of purchase price in accordance with Clause (13) of Agreement No. 2. According to the evidence of PW3, the cost of construction in 1978 would have been RM32,000. The difference between this and RM45,000 for 1982 would be RM13,000 for each house. Since the Vendors have been held by me earlier to be in breach of transfer in regard to these Semi-Detached Lots which were either paid in full or overpaid, and which number 9 out of the remaining 13 Semi-Detached Lots not transferred, I assess the sum by multiplying RM13,000 by 9.

I therefore order that the Vendors do pay a sum of RM117,000 as damages in regard to increased cost of construction in respect of the Semi-Detached Lots.

The claim for loss of rent made by the Purchasers, another kind of alleged consequential loss, in my view, should not be allowed. The claim would appear to be too remote, for *inter alia*, it appears to rest on the basis, from learned Counsel's submission, of the rent income of the buildings which could have been built on the Semi-Detached Lots. On the contrary, I find from the evidence that these Semi-Detached Lots were meant more likely than not, for the Purchasers' members belonging to the group of lower income, to build, presumably, their "dream homes" on the Lots, rather than for renting or leasing purposes. The claim is also remote because it fails to measure up to the test of the *Victoria Laundry* case.

There is another self-sufficient and distinct reason for not awarding damages under this head of claim for loss of rent in the circumstances of this case even if the claim is not too remote. I exercise my discretion in not allowing it. In my view, the Courts have a discretion, such discretion to be exercised not capriciously but judicially, as to what sort of damages a plaintiff deserves. The claim is but one of the recognised heads of damages, not statutorily required to be assessed. Such heads of damages are but aids to reaching a just amount or fair compensation. Please see the case of *Fletcher v. Autocar & Transporters Ltd.* [1968] 1 All ER 726. Assuming that this item of loss of rent is not too remote, in view of my having just awarded a not inconsiderable sum for increased cost of construction, to add another claim of loss of rent to it would, in the circumstances, not be fair and reasonable; also tantamount to giving perfect compensation or punitive or ruinous damages; or in effect giving damages twice over for a single cause of action bearing in mind that both heads of damages are similar consequential damages, which are apt to overlap, and not as distinct and dissimilar from each other as, e.g. in the cost of tort, damages for loss of future earnings and damages for pain and suffering for injuries. There is also authority for saying that in the given example of the two awards of damages for pain and suffering and loss of future earnings, when an award for one is substantial, the award for the other ought also to be reduced somewhat from the usual figure according to discernible trend. It is not necessary in the instant case to go into that further.

I now deal with the damages, if any, for the ten (10) Bungalow Lots, in respect of which the Vendors were plainly seen to be in breach for failing to deliver and transfer them. The damages ought to be, it being the normal measure, the market value of the 10 Detached Bungalow Lots at the contractual time for completion less the contract price. Please see the case of *Diamonds v. Campbell Jones & Ors.* [1961] 1 Ch 22. The contractual time for completion would be, in my view, the time when the Vendors would be required under the Agreement No. 2 to transfer the titles of the Bungalows Lots to the Purchasers. Having regard to the letter of Vendors' solicitors dated 9 June 1978, (A39), calling for payment of balance on account of the titles being issued, (and this has reference to Clause (13) of the Agreement No. 2), and the subsequent payment of such balance in August, 1978 thereupon it would be incumbent on the vendors to transfer such titles as per Clause (13) aforesaid, the contractual time for completion and therefore the market value in question would be that in August, 1978. Again, I would have to refer to the evidence of PW3. When referring to single-storey detached house on land of 7,992 sq.feet (which is close to the supposedly standard area of 7,000 sq. ft. of each of those Detached Bungalow Lots), he said that the value of such land would be, in 1978, RM2.75 per sq. foot as compared with the contract price at RM2.90 per sq.foot. It would appear that land price at RM2.90 per sq.ft. paid to the Vendors was on the high side. The Purchasers therefore suffer no loss under this head for which I therefore award nothing.

The claim for increased cost of construction, if found, for reasons and manner of assessment already stated, to be obtainable in the case of Semi-Detached Lots, should equally be available to the Purchasers in the case of these eleven (11) Bungalow Lots for the same reasons. Again reliance is made on the evidence of PW3 which I accept. He said the cost of construction of such a house appropriate to these 11 Bungalow Lots would be RM44,000 in 1978 and RM57,500 in 1982, the difference being RM13,500.

I therefore award RM148,500 for damages in the nature of increased cost of construction, or put in another equally expressive way, under another so-called head of damages, i.e., for loss of the opportunity to have a house built according to 1978 cost.

My observations for not allowing loss of rent earlier apply equally in regard to these 11 Bungalow Lots.

It will be quite tedious and not strictly necessary for me in this long judgment, and to a lesser degree to other persons who have to peruse this judgment for diverse purposes, to refer in detail to each piece of evidence and each point of submission I have considered. It is sufficient for me to have set out reasons above for my conclusions in the light of which, such evidence or point of submission not mentioned by me will, by very clear implication, be seen to have either been accepted or rejected, or deemed unnecessary.

More specifically, by way of simplification of the preceding paragraph, it will be seen that I have given detailed reasons for, and dealt with more extensively the contentions and defences of the Vendors who are, to use a rather archaic but more expressive saying, being condemned in damages etc., and to whom as a matter of basic fairness, the Court owes it to them to deal with them in the way indicated. Different consideration applies to contentions or grounds of claims of the Purchasers who have already succeeded on the specified grounds set out above earlier, and to deal with other grounds and their contentions will be thus, *inter alia*, strictly unnecessary.

I therefore give judgment for the sums aforesaid. I must add that these sums have depended very much on arithmetical calculation, and arithmetical errors are apt to occur with so much calculation being done in this case. The arithmetical accuracy of the figures therefore stands to correction when Counsel drew up the necessary order in this case before the approval and extracting of the same. I order also costs to be paid by the defendants with a certificate for two Counsel in view of the complexities of this case.

Also found at [1984] 1 CLJ 250